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PRECEDENT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO THE CIA'S HIGH VALUE DETAINEES PROGRAM IN AND THROUGH EUROPE

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PRECEDENT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO THE CIA'S HIGH VALUE DETAINEES PROGRAM IN AND THROUGH EUROPE

*Tarik Abdel-Monem**

I. INTRODUCTION: "THE SPIDER'S WEB"

Rendering terror suspects to nations that permit the use of torture is one of several methods the United States has added to its national security arsenal in recent decades. News leaks and reports regarding the "outsourcing of terror" are not new, especially after September 11, 2001. According to a former CIA official, "[w]e pick up a suspect or we arrange for one of our partner countries to do it. Then the suspect is placed on civilian transport to a third country where, let's make no bones about it, they use torture. If you want a good interrogation, you send someone to Jordan."¹

Jordan is a United States ally that is – according to other former officials – "willing to help any way they can" and has "the most professional and sophisticated interrogators [the United States] can rely on."² Reports by Amnesty International and other news sources have identified Jordan as a transit or destination point for terror suspects apprehended in Afghanistan or Pakistan.³ Allegations of torture associated with the rendition of terror suspects to Jordan should not be surprising. A U.S. State Department country report on human rights in Jordan that was released on March 6, 2007, referred to a number of

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1. See Adrian Levy & Kathy Scott-Clark, *One Huge US Jail*, GUARDIAN, Mar. 19, 2005, available at <http://www.guardian.co.uk/print/0,,5150244-108920,00.html> (discussing United States' international network of detention facilities created in wake of 9/11).

2. See Ken Silverstein, *U.S. Partnership with Jordan was Targeted*, L.A. TIMES, Nov. 12, 2005 (interviewing former CIA and State Department officials about rendition to Jordan).

3. See AMNESTY INTERNATIONAL, JORDAN 'YOUR CONFESSIONS ARE READY TO SIGN': DETENTION AND TORTURE OF POLITICAL SUSPECTS (2006), available at <http://web.amnesty.org/library/Index/ENGMDE160052006> (discussing allegations of torture and mistreatment by Jordanian security forces and rendition); Silverstein, *supra* note 2 (identifying six cases of alleged rendition involving Jordan).

torture allegations and other basic human rights violations committed by its government.⁴

Recent charges that European nations have played a role in the United States' practice of rendition were much more surprising. A number of European nations have been sharp critics of United States' policies regarding the continued detention of inmates at Guantanamo Bay, including European nationals.⁵ Most importantly, Europe arguably has the world's strongest regional human rights treaty in existence: The European Convention on Human Rights.⁶

The first major account of alleged "black sites" on European soil was reported in a November 2, 2005, Washington Post story by Dana Priest.⁷ According to the article, the CIA developed a global transit and detention system with little strategic planning or forethought shortly following September 11, 2001. Terror suspects captured in Afghanistan, Pakistan, or other nations by the U.S. military or intelligence services of partnering agencies were classified into two different groups. Those with questionable intelligence value were provided to the governments of Egypt, Jordan, and Morocco for interrogation. A second group of about thirty detainees, considered to be high value intelligence sources, were imprisoned in secret sites directly financed and operated by CIA personnel at Guantanamo Bay, a location in Thailand,⁸ and undisclosed Eastern European nations.⁹

4. See U.S. DEP'T OF STATE, JORDAN: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78855.htm> (outlining allegations of various human and civil rights violations in Jordan).

5. The most well known case is that of British nationals nicknamed "the Tipton Three." One of the three was the named plaintiff in *Rasul v. Bush*, 542 U.S. 466 (2004). The story of "the Tipton Three" was recently portrayed in the film *THE ROAD TO GUANTANAMO* (Roadside Attractions 2006).

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention for Human Rights].

7. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1 (reporting alleged covert detention system operated by CIA in nations including Afghanistan, Thailand, and Eastern European countries).

8. See *Disbelief at Thai Terror Centre Denial*, SYDNEY MORNING HERALD, Nov. 5, 2005 available at <http://www.smh.com.au/articles/2005/11/05/1130823430288.html> (noting rumored black site in Thailand was Voice of America radio station in Udon Thani province).

9. See *id.* (outlining development and existence of CIA's alleged international detention system for terror suspects).

Following the Washington Post's article, further revelations were reported about the extent of the CIA system by a variety of sources. On November 7, 2005, Human Rights Watch issued a press release stating that their independent research confirmed the Post's report.¹⁰ According to its accounts, examination of flight records of a CIA operated airplane indicated that in 2003 and 2004, it had transported a number of detainees between Afghanistan, Guantanamo Bay, Morocco, Romania, and Poland.¹¹ The same day the Council of Europe appointed Dick Marty, a Swiss member of the Parliamentary Assembly, to lead an investigation into the alleged prisons in the Council's member-states.¹² Soon afterwards, Marty requested information on air traffic patterns from EuroControl, Europe's unified air traffic management organization, and the European Union's Satellite Centre.¹³

The Council of Europe's Secretary General, Terry Davis, also sent a formal questionnaire to every member-state of the Council on November 21, 2005, requesting information on how the member-states' national laws prevented cooperation with foreign intelligence services to secretly detain individuals.¹⁴ In December, Secretary of State Condoleezza Rice issued a statement intimating that any actions taken by the United States in Europe were conducted with regard to the full sovereignty of host nations, and that she could not "discuss information that would compromise the success of intelligence, law enforcement

10. Press Release, Human Rights Watch, Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe (Nov. 7, 2005), *available at* <http://hrw.org/english/docs/2005/11/07/usint11995.htm> (outlining research based on flight records of a CIA operated plane).

11. *Id.* (detailing plane flight records carrying detainees to various countries).

12. Letter from Holly Cartner, Dir. Of Eur. And Cent. Asia Div., and Lotte Leicht, European Union Dir., to Ministers of member States of the Council of Europe (Jan. 9, 2006), <http://hrw.org/english/docs/2006/01/06/eu12385.htm> (noting appointment of Dick Marty to lead investigation into alleged prison sites).

13. *See Europe 'Knew About' CIA Flights*, BBC, Jan. 24, 2006, <http://news.bbc.co.uk/2/hi/europe/4641810.stm> (discussing Mr. Marty's investigation).

14. *See* Cartner, *supra* note 12; *MI5 'Given Secret Prisons Data'*, BBC, Nov. 24, 2005, *available at* http://news.bbc.co.uk/2/hi/uk_news/politics/4464962.stm (quoting Mr. Terry's request to obtain information about "the manner in which their internal law ensures that acts by officials of foreign agencies within their jurisdiction are subject to adequate controls").

and military operations.¹⁵ The statement was interpreted as an implied admission that the clandestine prisons did exist in Europe, and that such operations were conducted with the permission of European authorities.¹⁶

While European investigations intensified, accounts of “erroneous renditions” were also made public. In another article written by Dana Priest in December of 2005, the Washington Post reported that the U.S. Ambassador to Germany told the German interior minister that the CIA had mistakenly detained a German national for five months.¹⁷ Khaled Masri, the wrongfully detained German citizen, was arrested by local police while vacationing in Macedonia. The authorities turned Masri over to CIA operatives, who took him to Afghanistan, where the CIA held and allegedly tortured him. One of Masri’s interrogators reportedly said, “[y]ou are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know.”¹⁸ Masri was later flown back to Europe and left on a remote Albanian hillside in the middle of the night without explanation. The authorities arrested Masri because he shared a name with a wanted 9/11-associated suspect. Priest’s article further described an alleged account of how the CIA “rendition group” operates:

Members of the Rendition Group follow a simple but standard procedure: Dressed head to toe in black, including masks, they blindfold and cut the clothes off their new captives, then administer an enema and sleeping drugs. They outfit detainees in a diaper and jumpsuit for what can be a day-long trip. Their destinations: either a detention facility operated by cooperative countries in the Middle East and Central Asia, including Afghanistan, or one of the CIA’s own covert prisons — referred to in classified documents as “black sites,” which at various times have been operated in eight countries, including several in Eastern Europe.¹⁹

Similar stories were also reported in the European press. An Egyptian cleric living in Italy was allegedly kidnapped by

15. See Glenn Kessler, *Rice Defends Tactics Used Against Suspects*, WASH. POST, Dec. 6, 2005, at A1 (discussing Condoleezza Rice’s statements about alleged prison system made prior to European visit).

16. See *id.* (explaining Rice’s comments acknowledged United States knew about rendition).

17. Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1.

18. *Id.*

19. *Id.*

CIA operatives in 2003, flown to Egypt, tortured, and later released. Italian prosecutors have since issued warrants for the suspected CIA agents, who no longer reside in Italy.²⁰ Following the July 7, 2005, London train bombings, a number of Pakistani migrant workers in Greece were allegedly detained, interrogated, and mistreated by a combination of Greek and British intelligence operatives. The Pakistani workers were later released, and the governments of Greece, the United Kingdom, and Pakistan denied any involvement, despite protests from Greek opposition parliamentarians.²¹ Both the Italian and Greek situations continue to be investigated.

On September 26, 2002, a Canadian citizen suspected of being an al-Qaida associate – Maher Arar – was arrested at JFK Airport while in transit from North Africa to Montreal. Arar was sent to Syria, where he was allegedly detained in a “grave-like” cell, beaten with fists and cords, and deprived of food and water.²² After a diplomatic row between Canada, Syria, and the United States, he was released over a year later and reunited with his family. Arar’s ordeal and subsequent media attention led to Time magazine naming him the “Canadian Newsmaker of the Year” in 2004.²³

In the January 2006 interim report on the Council of Europe’s formal investigation into the detention centers, Dick Marty referenced an intercepted fax by Egyptian authorities that “black sites” had existed in Romania, Bulgaria, Macedonia,

20. See *Italy Issues Fresh CIA Warrants*, BBC, July 25, 2005, <http://news.bbc.co.uk/2/hi/europe/4716333.stm> (discussing the case of Osama Mustafa Hassan).

21. See *Greek MPs Press ‘Abductions’ Case*, BBC, Dec. 27, 2005, <http://news.bbc.co.uk/2/hi/europe/4563168.stm> (discussing calls for investigating alleged abductions by Greek opposition parliamentarians); *Ruling backs Greek abduction case*, BBC, May 11, 2006, <http://news.bbc.co.uk/2/hi/europe/4763777.stm> (discussing Greek prosecutor’s recommendation that charges be pressed against Greek security personnel allegedly involved in abductions).

22. See DeNeen L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria*, WASH. POST, Nov. 5, 2003, at A1 (discussing case of Arar); Tim Harper, *U.S. ruling dismisses Arar lawsuit*, TORONTO STAR, Feb. 17, 2006, at A2.

23. See *Arar Named 2004 Canadian Newsmaker*, CBC NEWS, Dec. 20, 2004, <http://www.cbc.ca/story/canada/national/2004/12/19/time-newsmaker041219.html>; Steven Frank, *Seeking The Truth; Why Was Maher Arar Detained and Handed to Syrian Torturers? His Search For Answers Is Shaking Canada’s Establishment*, TIME INT’L, Dec. 27, 2004, at 70.

Kosovo and Ukraine.²⁴ Marty also stated that, if practices of rendition by CIA operatives occurred in Europe, it was “highly unlikely that European governments, or at least their intelligence services, were unaware [of them].”²⁵

Following an examination of information gathered from Council of Europe member-states, Secretary General Davis released a statement concluding that almost none of the member-states had adequate measures in place to prevent foreign intelligence operatives from violating human rights on Council of Europe member-states’ soil.²⁶ Davis had previously noted that “Europe appears to be a happy hunting ground for foreign security services.”²⁷ He also stated that “[w]e have received official acknowledgment of ‘handing over’ individuals to foreign officials through procedures which ignore the standards and safeguards required by the European Convention on Human Rights.”²⁸

In a comprehensive report on the alleged detention system, issued on June 7, 2006, Marty described the CIA operation as “a network that resembles a ‘spider’s web’ spun across the globe.”²⁹ According to information gathered from member-state governments, witness accounts, satellite imagery, and air traffic records, Marty’s report described hundreds of flights through European air space, abductions, and end-point destina-

24. See Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions In Council of Europe Member States*, ¶5, AS/Jur (2006) 03 rev, (Jan. 22, 2006) (prepared by Dick Marty) available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf (referencing fax from Egyptian authorities to Egyptian embassy in London intercepted by Swiss intelligence services).

25. See *id.* ¶ 66.

26. Speaking Notes of Terry Davis, Secretary General of the Council of Europe, Strasbourg Press Conference, (Apr. 12, 2006), http://www.coe.int/t/secretarygeneral/sg/speeches/2006/J_12042006_Speaking%20notes%20Press%20conference_en.asp.

27. Press Release, Council of Europe Secretary General, Publication of the Report on Alleged Illegal Detentions and Rendition Flights in Europe (Mar. 1, 2006), [https://wcd.coe.int/ViewDoc.jsp?Ref=PR110\(2006\)&Sector=secDC&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE](https://wcd.coe.int/ViewDoc.jsp?Ref=PR110(2006)&Sector=secDC&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE).

28. Davis, *supra* note 26.

29. EUR. PARL. ASS., *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States*, ¶ 280, AS/Jur (2006) 16 Part II, (June. 7, 2006), (prepared by Dick Marty) http://assembly.coe.int/main.asp?Link=/committeedocs/2006/20060606_ejdoc162006partii-final.htm.

tions across the world where terror suspects were ultimately detained.

The report identified four categories of locations composing the rendition network: (1) "Stopover points" in Athens, Greece; Prague, Czech Republic; Prestwick, Scotland; and Roma Ciampino, Italy where civilian and military aircraft stopped for refueling; (2) "Staging points," in Baku, Azerbaijan; Frankfurt and Ramstein, Germany; and Larnaca, Cyprus where operations were planned; (3) "Pick-up points" in Aviano, Italy; Skopje, Macedonia; Stockholm, Sweden; and Tuzla, Bosnia where individuals were arrested and flown to other nations; and (4) "Transfer/Drop-off points" in Amman, Jordan; Baghdad, Iraq; Cairo, Egypt; Guantanamo Bay, Cuba; Kabul, Afghanistan; Szymany, Poland; Tashkent, Uzbekistan; and Timisoara, Romania where detainees were transported.³⁰ By implication, Marty's report named a number of European nations responsible for "active or passive collusion" in the rendition network: Cyprus, Germany, Greece, Ireland, Italy, Poland, Portugal, Romania, Spain, Turkey, and the United Kingdom.³¹ Finally, the report identified seven nations associated with specific cases of alleged rendition: Bosnia; Germany; Italy; the former Yugoslav Republic of Macedonia; Sweden; Turkey; and the United Kingdom.³² The report concluded that Europe was "not a victim of a secret CIA plot," because a number of European nations either actively participated with the CIA in the development and maintenance of the rendition network, or knowingly allowed the network to operate while doing nothing.³³

President George Bush officially disclosed the existence of the CIA detention system during a speech given in the East Room on September 6, 2006.³⁴ In his speech, the President stated that "a small number of suspected terrorist leaders and operatives" had been detained and questioned outside the country, including Abu Zubaydeh and Khalid Sheikh Mohammed.³⁵

30. *See id.* at 16, 17.

31. *See id.* at 60.

32. *See id.* at 60.

33. *See id.* at 59.

34. George W. Bush, President, Speech in East Room Discussing Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

35. *Id.*

He also stated that “[t]he United States does not torture. It’s against our laws, and it’s against our values. I have not authorized it — and I will not authorize it.”³⁶ There was no mention, however, whether other nations tortured suspects after they were rendered through the CIA program.

II. ANALYSIS: APPLICATION OF ECHR PRECEDENT

A. *The European Convention on Human Rights*

The European Convention on Human Rights is arguably the Council of Europe’s most important creation and *raison d’être* of the regional organization. The Council was created in 1949 to protect democracy and human rights in post-war Europe.³⁷ Due to the nature of the political charter, initial membership in the Council was restricted to ten allied Western European countries and excluded non-democratic Soviet-bloc nations.³⁸ The Council has subsequently expanded to include forty-six European nations, including Turkey, Russia, and almost every ex-Soviet bloc nation in Eastern Europe.³⁹ Every one of the European nations mentioned in the Marty report are also Council of Europe members.

The Council created the European Convention on Human Rights in 1950.⁴⁰ As a requirement of membership in the Council, all member-states must become party to the Convention and

36. *Id.*

37. See Lamberto Dini, Minister for Foreign Affairs of Italy, Address at the European Ministerial Conference on Human Rights (Nov. 3, 2000), in COUNCIL OF EUROPE, EUROPEAN MINISTERIAL CONFERENCE ON HUMAN RIGHTS & COMMEMORATIVE CEREMONY OF THE 50TH ANNIVERSARY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (2002). “The Council of Europe has changed into a more political and operational organization. One thing has not changed: the protection of human rights is and remains at the heart of its mission.” See *id.* at 15. (statement of Walter Schwimmer, Secretary General of the Council of Europe).

38. See COUNCIL OF EUROPE, MANUAL OF THE COUNCIL OF EUROPE: STRUCTURE, FUNCTIONS AND ACHIEVEMENTS 3 (1970) (listing original ten members of Council: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom).

39. See Council of Europe, *The Council of Europe’s Member States*, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited Jan. 1, 2008) (providing comprehensive list of Council of Europe members and their respective joining dates).

40. See DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 17-19 (1996) (discussing creation and early history of European Convention on Human Rights).

adhere to its requirements and obligations.⁴¹ Many of the European Convention's protections reflect those also provided in the Universal Declaration of Human Rights, which served as a model for the Convention and its drafters.⁴² Human rights secured under the Convention include the right to life,⁴³ right to liberty and security,⁴⁴ right to a fair trial,⁴⁵ prohibition of torture or degrading treatment or punishment,⁴⁶ and right to prohibition of slavery and forced labor.⁴⁷

The Convention's judicial body is the European Court of Human Rights (Court of Human Rights), based in Strasbourg, France. Bringing a case to the Court under alleged Convention violations is still an avenue of last resort. Under the Convention, the Strasbourg Court can only hear controversies after all domestic options for relief have been exhausted.⁴⁸ Similarly, it will not review cases that have been brought before another international tribunal.⁴⁹ Cases are routinely declared inadmissible because of failure to meet such standards.

Still, the Court maintains final jurisdiction over all Council of Europe member-states.⁵⁰ Additionally, not only member-states, but individuals can bring cases for review before the

41. See European Convention for Human Rights, *supra* note 6, ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

42. See European Convention for Human Rights, *supra* note 6 ("Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948 . . . as the governments of European countries . . . take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration").

43. European Convention for Human Rights, *supra* note 6, at art. 2.

44. European Convention for Human Rights, *supra* note 6, at art. 5.

45. European Convention for Human Rights, *supra* note 6, at art. 6.

46. European Convention for Human Rights, *supra* note 6, at art. 3.

47. European Convention for Human Rights, *supra* note 6, at art. 4.

48. See European Convention for Human Rights, *supra* note 6, at art. 35(1) ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.").

49. European Convention for Human Rights, *supra* note 6, at art. 35(2).

50. See European Convention for Human Rights, *supra* note 6, at art. 32(1) ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention."); European Convention for Human Rights, *supra* note 6, at art. 32(2) ("In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."); European Convention for Human Rights, *supra* note 6, at art. 46(1) ("The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.").

Court.⁵¹ Virtually all rulings by the Court are respected by member-states.⁵² This includes judgments requiring the payment of significant monetary damages to plaintiffs.⁵³ Member-states have also made considerable changes to domestic laws in order to comply with the Court's judgments.⁵⁴ For these reasons, the Convention is arguably one of the strongest regionally enforced human rights treaties in the world, and the number of cases brought before the Court of Human Rights has increased, particularly with the admission of new member-states in the Council such as Russia.⁵⁵

*B. Application of Convention Obligations to the CIA
Detention System in Europe*

In the context of prison conditions and alleged human rights violations, a number of important cases have been decided on the basis of Article 3 of the Convention, which prohibits torture and inhuman treatment.⁵⁶ *Ireland v. United Kingdom*⁵⁷ was one of the first notable cases dealing with allegations of inhuman treatment of prisoners in custody. In *Ireland*, alleged operatives of the Irish Republican Army (IRA) were ar-

51. European Convention for Human Rights, *supra* note 6, at art. 34 ("The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties.").

52. See D.J. HARRIS ET. AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 702 ("[L]evel of compliance with judgments . . . is generally recognised to be exemplary.").

53. See *European Human Rights Court Condemns Turkey in Kurd's Death*, AGENCE FRANCE PRESSE, Feb. 14, 2002 (noting \$59,600 fine imposed on Turkey for torture-death of Kurd); *Council of Europe Says London Must Allow Elections in Gibraltar*, AGENCE FRANCE PRESSE, Jun. 26, 2001 (noting \$64,000 fine imposed on United Kingdom for not securing voting rights for residents of Gibraltar); *France Fined by European Court Over Murder Trial of German*, AGENCE FRANCE PRESSE, Feb. 13, 2001 (noting \$14,000 fine imposed on France for failing to secure trial rights for German doctor).

54. See MANUAL OF THE COUNCIL OF EUROPE: STRUCTURE, FUNCTIONS AND ACHIEVEMENTS 282 (1970) (noting instances when Norway changed its constitution and Austria changed its Code of Criminal Procedure).

55. See *Strasbourg Court Sets Undesirable Precedent for Russia*, RIA NOVOSTI, Mar. 3, 2005 ("The European Court for Human Rights has already received more than 150 'Chechen cases,' i.e. complaints from Russian citizens who suffered in military operations during the counter-terrorist operation in Chechnya.").

56. See European Convention for Human Rights, *supra* note 6, at art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

57. 2 Eur. Ct. H.R. 25 (1978).

rested and imprisoned by British forces following a wide-scale anti-IRA campaign initiated in 1971.⁵⁸ Military forces interrogated a number of individuals at length, utilizing practices designed to physically and psychologically impair and disorient detainees, such as hooding, prolonged standing, sleep deprivation, exposure to loud noise, and food and water deprivation.⁵⁹ In its analysis, the Court of Human Rights stated that a determination of whether such activities were deemed to be either “inhuman treatment” or “torture” – both of which were prohibited by Article 3 – was a question of fact.⁶⁰ The Court concluded that all of the interrogation techniques were severe enough that they amounted to inhuman treatment, and were thus illegal under the Convention.⁶¹

The 1999 case *Selmouni v. France*⁶² is also a noteworthy development in the Court’s Article 3 case law. In *Selmouni*, a Dutch-Moroccan drug dealer was arrested by French police and seriously beaten while in custody.⁶³ Besides being repeatedly struck with a bat, he was also sodomized with a baton, urinated on, and threatened with syringes and a blowtorch – allegations that corresponded with medical examinations conducted after his eventual release.⁶⁴ As in *Ireland*, the Court stated that a factual analysis was necessary to determine if such acts amounted to a violation of Article 3, and concluded that the conduct of the French police was so egregious that their actions did in fact amount to torture.⁶⁵ In an interesting dictum, the Court noted that “[e]ven in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture.”⁶⁶ This principle reflects the Convention’s requirement that the prohibition on torture is one of the

58. *Id.* ¶ 39 (outlining operations conducted under Operation Demetrius).

59. *Id.* ¶¶ 92-93, 96 (describing allegations of mistreatment by prison personnel and interrogators).

60. *See id.* ¶ 162 (noting facts necessary to determine if activities rise to level of severity considered inhuman treatment).

61. *See id.* ¶¶ 164-68 (holding practices of abuse in detention facilities contrary to Article 3).

62. 1999 Eur. Ct. H.R. 66 (1999).

63. *Id.* ¶ 19.

64. *See id.* ¶ 24 (describing Selmouni’s allegations of abuse and corresponding medical evidence).

65. *See id.* ¶¶ 105-06 (finding France in violation of Article 3 prohibition of torture).

66. *Selmouni v. France*, 1999 Eur. Ct. H.R. 66 ¶ 95.

Convention's "non-derogable" obligations, as even in circumstances of emergency, Article 3 protections cannot be subverted or waived.⁶⁷ Through *Selmouni*, France earned the dubious distinction of being the first Western European nation found in violation of the Convention's ban on torture.

Ireland and *Selmouni* have set important precedent outlining what forms of treatment violate the Article 3 prohibition of torture and inhuman treatment. Additionally, allegations about the secret prisons on European soil raise significant implications for Article 1 of the Convention. Article 1 strictly mandates that its member-states uphold the Convention's protections on its soil: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention."⁶⁸ The Convention thus imposes a positive obligation on member-states to safeguard human rights protections of persons within its physical territory. Regardless of whether or not European officials knew about, or were involved in, the administration of CIA prisons in Europe, a strict reading of Article 1 dictates that European nations should be held responsible for the commission of any human rights violations in Europe by the CIA or any other organization.

This principle is illustrated in *Ilașcu v. Moldova and Russia*,⁶⁹ which was decided in 2004. The critical factual context in the case centered around Moldova's civil war and subsequent break-up into two different territories. Following the dissolution of the Soviet Union, the former Moldavian Soviet Socialist Republic declared its independence in 1991 and changed its name to the Republic of Moldova.⁷⁰ In 1992, the newly independent Moldova was admitted into the Conference on Security and Cooperation in Europe and the United Nations.⁷¹ At the same time, the eastern portion of the former Soviet Republic declared its own independence as the Moldovan Republic of Transdnistria (MRT).⁷² Ethnic differences between the major-

67. See European Convention for Human Rights, art. 15(2) ("No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.").

68. European Convention for Human Rights, *supra* note 6, at art. 1.

69. *Ilașcu v. Moldova* (merits), 40 Eur. Ct. H.R. 46 (2004).

70. See *id.* ¶¶ 28-39 (outlining historical background of the independence movement of the Republic of Moldova).

71. *Id.* ¶ 40 (noting Moldova's entrance into CSCE and United Nations).

72. See *id.* ¶ 30.

ity Romanian population of the republic and Slavic ethnicities in the east fueled the bifurcation of the republic into these two separate territories.⁷³ Armed conflict between Moldovan forces and Transdnistrian separatists who wanted to remain with Russia began in 1990.⁷⁴ Shortly thereafter, the former Soviet Fourteenth Army, which had been based in Moldova since it was a Soviet Republic, entered the conflict and provided active military support to the pro-Russian separatists.⁷⁵ The government of Russia also established close diplomatic and economic relations with the breakaway republic.⁷⁶ With Russian economic and military assistance, the MRT was able to repel Moldovan forces and maintain itself as a separate territory.⁷⁷

The plaintiffs in the case were Ilie Ilașcu, Andrei Ivanțoc, Alexandru Leșco, and Tudor Petrov-Popa, four Moldovan nationalists who were detained by the separatist forces and allegedly beaten and mistreated as the civil war erupted.⁷⁸ Their captors were a mix of soldiers from the Fourteenth Army and MRT forces, and they were held in the Fourteenth Army headquarters in the breakaway Transdnistrian republic.⁷⁹ While detained, the plaintiffs were allegedly beaten, attacked with dogs, subjected to hallucinogenic drugs, and deprived of standard legal rights.⁸⁰ An MRT court tried the Moldovan nationalists on a series of charges under the criminal code of the former Moldovan Soviet Republic, and found them guilty of a number

73. See generally Nicholas Dima, *Politics and Religion in Moldova: A Case Study*, 34 MANKIND Q. 175 (1994) (discussing ethnic tensions in Moldova and its relation to country's civil war).

74. See *Ilașcu*, 40 Eur. Ct. H.R. 46, ¶ 43-44 (noting early development of armed hostilities between Moldovan and separatist forces).

75. See *id.* ¶¶ 42-69 (outlining involvement of Fourteenth Army in separatist cause).

76. See *id.* ¶¶ 137-58.

77. See generally Charles King, *Eurasia Letter: Moldova with a Russian Face*, FOREIGN POL'Y, Winter 1994, at 106 (discussing Moscow's relationship with Transdnistria). See also Pal Kolsto, Andrei Edemsky & Natalya Kalashnikova, *The Dniester Conflict: Between Irredentism and Separatism*, 45 EUROPE-ASIA STUDIES 973, 973-1000 (1993).

78. See *Ilașcu*, 40 Eur. Ct. H.R. 46, ¶¶ 188-211 (outlining plaintiffs' allegations and circumstances surrounding detention).

79. See *id.* ¶¶ 196-211 (discussing alleged conditions of plaintiffs' temporary detention in Fourteenth Army garrison).

80. *Id.* ¶¶ 201-11 (discussing alleged conditions while detained by MRT police forces).

of offenses.⁸¹ The plaintiffs later sued both the Republic of Moldova and Russia on a variety of charges under the European Convention, alleging violations of the Article 3 prohibition of inhuman treatment and torture, the Article 5 right to liberty, and the Article 6 right to a fair trial.⁸²

The principal question facing the Strasbourg Court involved the Article 1 obligation for member-states of the Convention to protect human rights within their jurisdiction. In this case, however, the alleged violations occurred in the territory of a break-away republic where the separatist MRT government and Russia maintained *de facto* control.

Russia argued that it should not be responsible for the activities conducted within the MRT because it was not Russian territory and that the presence of their troops in the breakaway region was for “peacekeeping” reasons.⁸³ The four plaintiffs, however, argued that Russia should be responsible for human rights violations within the MRT. They asserted that the Russian Fourteenth Army played a direct role in fighting with and supporting the separatist forces in the military conflict, which repelled Moldovan national forces and secured the territory of the MRT.⁸⁴ They also asserted that Russia had done nothing to prevent Cossack mercenaries from entering the MRT to fight alongside the separatists, and had in fact encouraged them to do so.⁸⁵ The provision of economic and political support by Russia on a number of levels also helped the MRT regime exist.⁸⁶ In sum, the plaintiffs argued that Russia’s support for the separatists in the Moldovan civil war resulted in the creation of the MRT, which was a *de facto* Russian occupation.⁸⁷

In its Grand Chamber decision by seventeen Strasbourg judges, the Court of Human Rights sided with the plaintiffs,

81. *Id.* ¶¶ 215-19 (describing trials and verdicts of plaintiffs in MRT court).

82. *Id.* ¶ 3 (outlining the plaintiffs’ charges).

83. *See Ilaşcu*, 40 Eur. Ct. H.R. 46, ¶¶ 353-54 (outlining Russia’s defense to charges it was responsible for alleged actions under Article 1).

84. *See id.* ¶¶ 364-65 (asserting Russia had directly engaged Moldovan forces in civil war).

85. *Id.* ¶ 366 (outlining plaintiffs’ arguments regarding Russia’s complicity with Cossacks and other mercenaries fighting with MRT).

86. *See id.* ¶ 369 (discussing plaintiffs’ arguments regarding economic activities between MRT and Russian entities).

87. *Id.* ¶ 364.

pointing to a long list of observations about Russia's military, political, and economic support for the MRT:

All of the above proves that the "MRT", set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given it by the Russian Federation.

That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate.

....

In conclusion, the applicants therefore come within the "jurisdiction" of the Russian Federation for the purposes of [Article] 1 of the Convention.⁸⁸

The evidence indicated that the four plaintiffs suffered from various forms of mistreatment while held in the custody of the MRT, and because of Russian jurisdiction in that area, the Court held that Russia was in violation of Article 3 of the Convention prohibiting torture and inhuman treatment.⁸⁹

The more difficult question before the Court was whether or not the Moldovan government was responsible for the alleged human rights violations of the four plaintiffs under Article 1. Moldova argued that it could not be responsible for any activities conducted within the breakaway MRT because it had no control or authority in that area, even though the alleged violations occurred within the physical borders of the nation.⁹⁰ The plaintiffs contended that although the alleged mistreatment was committed by separatists in an area controlled by them, the government of Moldova should still bear responsibility because it had positive obligations under the Convention to take sufficient measures to safeguard human rights within the physical borders of Moldova.⁹¹

In its assessment, the Court recognized that the literal meaning of "jurisdiction" in the Convention's Article 1 phrase to "secure to everyone within their jurisdiction the rights and

88. *Ilaşcu*, 40 Eur. Ct. H.R. 46, ¶ 392-94.

89. *See id.* ¶¶ 434-54 (discussing cases of Mr. Ilaşcu, Mr. Ivanțoc, Mr. Leșco, and Mr. Petrov-Popa).

90. *See id.* ¶ 300 (outlining Moldova's argument that it lacked territorial jurisdiction and authority in MRT).

91. *See id.* ¶ 306 (outlining plaintiffs' arguments regarding Moldova's responsibilities).

freedoms” is the physical area within the borders of member-states.⁹² However, there are limited exceptions to this definition. A state’s “jurisdiction” under Article 1 may extend beyond its physical borders in certain situations where its actions have a proximate effect on events that occur in other nations.⁹³ Additionally, a state’s jurisdiction may not extend to its borders in the event of a military occupation by an invading nation, such as the situation in Turkish-controlled Cyprus.⁹⁴ Determining if such an exception exists is a question of fact.⁹⁵ However, even when a state does not have complete authority over its own territory, it “has a duty to take all the appropriate measures which it is still within its power to take.”⁹⁶ In such an examination, the Court cannot define what activities constitute such a positive obligation, but it can define the minimum effort that should be undertaken to safeguard the Convention’s rights and protections.⁹⁷

In the case of Moldova, the Court recognized that the national government was “confronted with a secessionist movement” and that a full-scale civil war had erupted.⁹⁸ The Court also recognized that Moldova repeatedly petitioned the international community and United Nations regarding the situation,⁹⁹ and in the face of a secessionist movement backed with Russian military and economic support, Moldova could do little to regain control over the breakaway region.¹⁰⁰ After major mili-

92. See *id.* ¶ 312 (discussing previous case law’s definition of “jurisdiction”).

93. See *Ilaşcu*, 40 Eur. Ct. H.R. 46, ¶¶ 314-17 (discussing extension of Article 1 jurisdiction); see also *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. 439, ¶ 86 (1989).

94. See *Ilaşcu*, 40 Eur. Ct. H.R. 46, ¶ 312 (declaring exceptions to member-state’s jurisdiction under the Convention). *But cf.* *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. Ct. H.R. Rep. 99 (1996); *Cyprus v. Turkey*, App. No. 25781/94, 11 BHRC 45 (2001). In both *Loizidou* and *Cyprus*, the Court found Turkey liable for violations of the Convention in Cyprus because its jurisdiction extended to areas of Cyprus by virtue of its control through military occupation. See generally Tarik Abdel-Monem, *How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights*, 14 J TRANS. L. & POL’Y 159, 180-82 (2005) (discussing jurisdiction of countries in areas controlled by other nations).

95. See *Ilaşcu*, 40 Eur. Ct. H.R. 46, ¶ 313 (discussing need to examine objective facts that limit effective exercise of authority).

96. *Id.*

97. See *id.* ¶ 334 (discussing the Court’s role in determining what obligations exist for states in situations of impaired jurisdiction).

98. *Id.* ¶ 325 (discussing events leading to Civil War in Moldova in early 1990s).

99. *Id.*

100. See *Ilaşcu*, 40 Eur. Ct. H.R. 46, ¶ 341 “In the Court’s opinion, when confronted with a regime sustained militarily, politically and economically by a power

tary hostilities ended in 1992, Moldova entered into a series of negotiations with the MRT, while continuing its attempts to secure the release of the plaintiffs.¹⁰¹

In May of 2001, following years of pressure from the Moldovan government, the MRT finally released Ilașcu, one of the four plaintiffs, from imprisonment.¹⁰² Following Ilașcu's release, however, the Court noted that Moldova's attempts to negotiate the release of the remaining three plaintiffs slackened, with little to suggest the government was "diligent" in securing their freedom.¹⁰³ This decrease in actively pressing for the release of the other three prisoners led the Court to conclude that Moldova failed to discharge its positive obligation to secure the prisoners' human rights.¹⁰⁴ As a result of this analysis, the Court deemed Russia responsible for violating Article 3's prohibition of torture and inhuman treatment in regards to Ilașcu's imprisonment.¹⁰⁵ For the remaining three plaintiffs, however, the Court held Russia liable for their treatment under Article 3, and Moldova liable for failing to take the necessary measures to secure their well-being after May of 2001.¹⁰⁶ Additionally, the Court found that both parties violated the Convention's Article 5, which states, "[e]veryone has the right to liberty and security of person."¹⁰⁷ Russia violated the article by depriving the liberty of all the plaintiffs through its detention and imprisonment. Similar to its logic in deciding the Article 3 charges, the Court found Moldova in violation of Article 5 for Ilașcu until his release in May of 2001, and for the remaining three plaintiffs for failing to safeguard their liberty during imprisonment.¹⁰⁸

such as the Russian Federation . . . there was little Moldova could do to re-establish its authority over Transnistrian territory." *Id.*

101. *See Ilașcu*, 40 Eur. Ct. H.R. 46, ¶¶ 345-48 (outlining Moldova's actions regarding continued detention of plaintiffs).

102. *See id.* ¶ 234.

103. *See id.* ¶ 348 (discussing lack of evidence demonstrating Moldova's commitment to pursue release of prisoners).

104. *See id.* ¶ 352 (stating Moldova could be held responsible for Convention violations occurring after May 2001).

105. *See Ilașcu*, 40 Eur. Ct. H.R. 46, ¶ 2 (holding Russia responsible for violating Article 3 regarding treatment of Ilașcu).

106. *See id.* ¶¶ 442, 454 (holding Russia and Moldova responsible for Article 3 violations against remaining three plaintiffs).

107. European Convention for Human Rights, *supra* note 6, art. 5; *see Ilașcu*, 40 Eur. Ct. H.R. 46, ¶¶ 455, 463-64 (holding Russia liable for violating Article 5).

108. *Ilașcu*, 40 Eur. Ct. H.R. 46, ¶¶ 463-64.

Holding Moldova responsible for Convention violations that occurred within the breakaway MRT seemed like an unjust resolution to some. Six of the seventeen judges deciding the *Ilașcu* case partly dissented from the remaining Grand Chamber judges and argued that Moldova should not be liable for the alleged violations.¹⁰⁹ However, the majority's conclusion makes sense from a normative standpoint because it imposes a strict burden on member-states to do everything within their power, and in a reasonable context consistent with law, to secure the Convention's rights and protections within its jurisdiction.

The *Ilașcu* ruling has significant relevance to the allegations over the CIA prisons in Europe. *Ilașcu* indicates that member-states of the Convention have a positive obligation to protect and secure human rights within their physical territory even if the violations committed are not imputable to a member-state, are committed by parties not associated with the host government, and committed in areas not under the control or authority of the host government.¹¹⁰ Both Poland and Romania – which have been identified as host nations of alleged CIA prisons – are also member-states of the Convention. Because their jurisdiction would be triggered under Article 1, these nations would thus bear responsibility for any alleged Convention violations committed by the CIA on their soil. Likely violations would include inhuman treatment or torture banned by Article 3 if they occurred at the prisons.

A 2005 report by ABC News indicated that “enhanced interrogation techniques” used by the CIA in overseas operations included:

1. The Attention Grab: The interrogator forcefully grabs the shirt front of the prisoner and shakes him.
2. Attention Slap: An open-handed slap aimed at causing pain and triggering fear.
3. The Belly Slap: A hard open-handed slap to the stomach. The aim is to cause pain, but not internal injury. Doctors con-

109. See *id.* (Bratza, N. Rozakis, Hedigan, Thomassen, Panțîru, partly dissenting) (stating Moldova did not have direct authority over MRT); see *id.* (Loucaides, dissenting in part) (discussing Moldova's lack of authority over MRT).

110. See *Ilașcu*, 40 Eur. Ct. H.R. 46, ¶¶ 349-52, 464 (holding Moldova responsible for violations occurring in MRT); European Convention for Human Rights, *supra* note 6, at art. 56 (extending member-states' jurisdictions to territories within their responsibility).

sulted advised against using a punch, which could cause lasting internal damage.

4. Long Time Standing: This technique is described as among the most effective. Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than forty hours. Exhaustion and sleep deprivation are effective in yielding confessions.

5. The Cold Cell: The prisoner is left to stand naked in a cell kept near fifty degrees Fahrenheit. Throughout the time in the cell the prisoner is doused with cold water.

6. Water Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.¹¹¹

The same report indicated that the CIA used these techniques on about a dozen high-value al-Qaida detainees, including Khalid Sheik Mohammed, who was held, along with others, in military installations in Eastern Europe.¹¹² Mohammed reportedly "won the admiration" of interrogators for withstanding water boarding for over two minutes before breaking down, a length of time that far surpassed the average length of fourteen seconds most detainees could bear.¹¹³

Little is publicly known about the extent to which the aforementioned interrogation techniques or other harsh measures have been used by the CIA or other U.S. personnel on detainees overseas. In late 2002, the *Washington Post* reported that common interrogation techniques used by the CIA in overseas operations include: wearing of black hoods, sleep deprivation, exposure to loud noises, and placement in prolonged stress positions. The Court found in *Ireland v. The United Kingdom* that these techniques amounted to inhuman treatment. There have been reports of deaths allegedly caused by interrogation

111. Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005 (discussing case of Khalid Sheik Mohammed and others), <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>.

112. *See id.* "Currently, it is believed that one or more former Soviet bloc air bases and military installations are the Eastern European location of the top suspects. Khalid Sheik Mohammed is among the suspects detained there, sources said." *Id.*

113. *Id.*

techniques used by U.S. forces. An Iraqi-insurgent was killed at Abu Ghraib while in the custody of a CIA interrogator after having been subjected to a “Palestinian hanging” – a technique allegedly used in Israeli interrogation of Palestinians, where an individual is hung for a prolonged period from his or her wrists while bound behind the back.¹¹⁴ The European Court of Human Rights found in *Aksoy v. Turkey*,¹¹⁵ where security forces hung and brutally beat an alleged member of the Kurdish separatist movement, that Palestinian hangings are a form of torture.¹¹⁶ The CIA killed another Iraqi insurgent in their custody by wrapping him in a sleeping bag, tying an electrical cord around him, and beating him to death.¹¹⁷

In 2004, the *Washington Post* reported that the CIA stopped using such interrogation techniques.¹¹⁸ Later reports alleged, however, that the United States Department of Justice issued a secret opinion authorizing or re-authorizing the use of techniques such as water boarding and other harsh physical and psychological measures on detainees.¹¹⁹ A report by Dick Marty issued in June of 2007 concluded that the CIA did run prison facilities in Poland and Romania from 2003 to 2005.¹²⁰ These operations were created through a combination of NATO multilateral agreements and bilateral arrangements between the

114. See Jane Mayer, *A Deadly Interrogation: Can the CIA Legally Kill a Prisoner?* NEW YORKER, Nov. 14, 2005, at 44.

115. App. No. 21987/93, 23 Eur. Ct. H.R. 553, ¶ 64 (1996).

116. See *id.* (finding “Palestinian Hanging” cruel treatment characteristic of torture).

117. See Josh White, *Documents Tell of Brutal Improvisation by GIs; Interrogated General’s Sleeping-Bag Death, CIA’s Use of Secret Iraqi Squad Are Among Details*, WASH. POST, Aug. 3, 2005, at A1 (describing death of Abed Hamed Mowhoush).

118. See Dana Priest, *CIA Puts Harsh Tactics On Hold; Memo on Methods Of Interrogation Had Wide Review*, WASH. POST, July 27, 2004, at A1 (reporting that use of “enhanced interrogation techniques” by CIA were placed on hold because of legal concerns).

119. See Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (reporting Justice Department issues secret opinion in 2005 allowing for use of “painful psychological tactics” on high-value detainees in CIA custody).

120. See Dick Marty, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, ¶ 7, (June 11, 2007) available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> (“There is now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania.”).

United States and the host nations.¹²¹ The Polish site allegedly hosted the highest value detainees, including Abu Zubaydeh and Khalid Sheik Mohammed.¹²² The report alleged that detainees were forcibly exposed to extreme heat or cold; made to listen to “torture music” composed of blaring rock or rap, distorted verses from the Koran, industrial noises, and screams of women and children; and held in contorted stress positions by wall shackles.¹²³ If the CIA employed such interrogation techniques on European soil, the host nations would be liable for violating Article 3 of the Convention on Human Rights, according to *Ilașcu v. Moldova*.

C. Application of Convention Obligations to the Extradition of Terror Suspects to Nations Outside Europe

Besides the maintenance of CIA interrogation and detention facilities in European nations, there may be wider liability for those member-states that participated in extradition of suspects to non European countries. A leading Strasbourg case that corresponds to this fact pattern is *Soering v. United Kingdom*.¹²⁴ Jens Soering was a German national and student at the University of Virginia who allegedly murdered his girlfriend’s parents in Virginia.¹²⁵ Soering and his girlfriend left the country and were later arrested in England.¹²⁶ While in English custody, Soering allegedly admitted killing his girlfriend’s parents.¹²⁷ Soon afterwards, the United States requested that both Soering and his girlfriend be returned to Virginia under the terms of an extradition treaty between the United States and United Kingdom.¹²⁸ As the United Kingdom had abolished the death penalty, it requested that upon Soering’s extradition to the United

121. See *id.* ¶¶ 72-122 (discussing framework under which CIA operations in Poland and Romania developed).

122. *Id.* ¶¶ 126-27 (noting that the Polish detention site held the “most sensitive” suspects who underwent “enhanced interrogation techniques”).

123. See *id.* ¶¶ 245-271 (outlining reconstructed version of cell conditions).

124. App. No. 14038/88, 11 Eur. Ct. H.R. 439 (1989).

125. See *id.* ¶¶ 11-12 (outlining background to *Soering* case).

126. See *id.* “They disappeared together from Virginia in October 1985, but were arrested in England in April 1986 in connection with cheque fraud.” *Id.*

127. See *id.* ¶ 13 (outlining Soering’s alleged confession to English police).

128. See *id.* ¶ 14 (noting request for extradition of Soering and his girlfriend back to United States).

States, the death sentence not be sought.¹²⁹ However, the attorney for Bedford County, Virginia, where the murders occurred, indicated that he would seek the death penalty upon a finding of Soering's guilt.¹³⁰

Soering argued that extradition from the United Kingdom to Virginia would result in "inhuman and degrading treatment" prohibited under Article 3 because he would be subject to the "death row phenomenon" if found guilty.¹³¹ In essence, he argued that Article 3 of the Convention not only prohibits such treatment within the jurisdiction of member-states, but also obligates them to avoid placing a person in a position where he may suffer such treatment in other nations.¹³² In contrast, the United Kingdom argued that such a reading would create numerous difficulties for Convention members.¹³³ It asserted that member-states should not be responsible for the actions of governments in other nations, and argued that Soering's interpretation of Article 3 would disrupt international extradition treaties and create unreasonable responsibilities on the extraditing nation to examine the conditions and laws of receiving nations.¹³⁴

The Court began its analysis by noting that although a member-state should not be responsible for all the consequences of its actions abroad, the Convention requires that its protections be practical, effective, and consistent with the values of a democratic society.¹³⁵ A fundamental protection enshrined in the Convention is the prohibition of inhuman treatment and torture, an obligation that cannot be waived even in times of emergency or war.¹³⁶ Furthermore, knowingly extraditing an individual to a nation where there are "substantial grounds" for believing that an individual would suffer treatment contrary to Article 3 would not be consistent with the Convention's val-

129. *See* *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. 439, ¶ 20 (1989) (noting attorney for Bedford County, Virginia, recognized United Kingdom's desire for Virginia to avoid imposing death penalty on Soering upon finding of guilt).

130. *Id.* ("[T]he Virginia authorities informed the United Kingdom Government that Mr. Updike . . . intended to seek the death penalty in Mr. Soering's case").

131. *See id.* ¶ 76.

132. *Id.* ¶ 82.

133. *See id.* ¶ 83.

134. *Soering*, 11 Eur. H.R. Rep. 439, ¶ 83.

135. *Id.* ¶ 87.

136. *Id.* ¶ 88.

ues.¹³⁷ In Soering's case, the Court was forced to determine if, upon extradition to the United States, Soering would run "a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the 'death row phenomenon,' lies in the imposition of the death penalty."¹³⁸

Soering contended that a death row sentence amounted to inhuman treatment under Article 3 because it typically involves years of appeals, heightened psychological trauma, exposure to extreme physical conditions on death row, the possibility of sexual abuse at the hands of others, and the constant reminder of the death penalty.¹³⁹ In its holding, the Court agreed with Soering:

[I]n the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.¹⁴⁰

The Court concluded that the United Kingdom would be in violation of Article 3 if it proceeded to extradite Soering to Virginia.¹⁴¹

*Chahal v. The United Kingdom*¹⁴² is another key extradition case that triggered analysis of potential Article 3 responsibility.¹⁴³ Chahal was an Indian national who immigrated to England illegally, but was eventually allowed to stay under a general amnesty.¹⁴⁴ He became active in the Sikh autonomy movement, and in a return trip to India, he was allegedly ar-

137. *Id.* (discussing application of general principles of Convention to extradition of persons).

138. *Id.* ¶ 92.

139. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. 439, ¶ 105 (1989) (outlining Soering's arguments that the "death row phenomenon" amounts to an Article 3 violation).

140. *Id.* ¶ 111.

141. *See id.* Soering was later extradited to Virginia upon guarantees that the death penalty would not be sought for the murders. He is currently serving prison time in Virginia, has authored several books, published a website (<http://www.jenssoering.com/>), and maintains his innocence.

142. App. No. 22414/93, 23 Eur. Ct. H.R. 413 (1996).

143. *See id.*

144. *See id.* ¶ 12 (outlining background and legal status of plaintiffs).

rested and mistreated by government police.¹⁴⁵ Upon his release and return to England, Chahal became deeply involved in the Punjab independence movement. In the mid 1980s, Chahal was charged with a variety of crimes, including alleged involvement in conspiracies to kill the Indian Prime Minister and various political rivals in England.¹⁴⁶ In 1990, the United Kingdom's Home Secretary determined that Chahal should be deported from the country because of national security concerns.¹⁴⁷ The Home Secretary believed that Chahal was involved in the active planning and support of terrorist activities both in India and England.¹⁴⁸ Chahal made a claim for political asylum in the United Kingdom, and argued that if he was sent back to India he would be tortured for his political activities.¹⁴⁹

The United Kingdom denied Chahal's asylum claim and the government proceeded with its plans to deport him. He filed suit with the Strasbourg Court, and argued that deportation would amount to an Article 3 violation because he would be persecuted and mistreated upon his return to India.¹⁵⁰ The United Kingdom's counter-argument rested on a sliding scale analogy. It argued that the Court should weigh the risk that Chahal posed as a national security threat against the risk that he would receive ill treatment in India.¹⁵¹ Because it was uncertain he would be tortured or mistreated in India, the allegation that he was a threat to national security should rule in favor of his deportation:

The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community.¹⁵²

145. *See id.* ¶¶ 17-18 (outlining Chahal's return trip to India).

146. *See id.* ¶¶ 23-24 (outlining Chahal's arrests in United Kingdom).

147. *See id.* ¶¶ 23-25 (describing Chahal's arrests and Homeland Secretary's intention to deport him according to Immigration Act of 1971).

148. *See Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. Ct. H.R. 413, ¶ 30 (1996) (discussing Homeland Secretary's identification of Chahal as a major figure involved in planning and funding Sikh terrorist activities).

149. *See id.* ¶ 26 (outlining Chahal's arguments and allegations that he would be tortured by Indian authorities).

150. *See id.* ¶ 72.

151. *Id.*

152. *See id.* ¶ 76

In response, Chahal argued that the protections of Article 3 cannot be mediated by concerns for national security.¹⁵³

The Court agreed with Chahal's interpretation of Article 3 and ruled in his favor against the United Kingdom.¹⁵⁴ In an important dictum, it also noted that Article 3's provisions are absolute even in the context of terrorism or national security:

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.

. . . .

The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.¹⁵⁵

Therefore, the Court was charged with determining whether or not Chahal's deportation would pose a real risk of ill-treatment banned under Article 3. Chahal pointed to a number of factors, including the allegations that he had previously been tortured by authorities in India, and reports by Amnesty International that Punjabi police operated with impunity and were known to kidnap and torture Sikh militants.¹⁵⁶ The Court was particularly concerned with the fact that despite the history of "disappearances" and human rights violations in the country's campaign against Sikh militants, there had been no fundamental changes or reforms to the Indian police forces that would guarantee compliance with human rights.¹⁵⁷ For these reasons, the Court found that "there is a real risk of Mr. Chahal being subjected to treatment contrary to Article 3 (art. 3) if he is

153. See *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. Ct. H.R. Rep. 413, ¶ 77 (1996).

154. *Id.* ¶ 107.

155. *Id.* ¶¶ 79-80.

156. See *id.* ¶¶ 87-89 (reviewing governmental, intergovernmental, and nongovernmental assessments of the human rights situation in India).

157. *Id.* ¶¶ 102-103 (considering human rights violations by Indian police against Sikh militants and lack of police reform).

returned to India. Accordingly, the order for his deportation to India would, if executed, give rise to a violation of Article 3.”¹⁵⁸

Since the *Chahal* decision, the European Court of Human Rights has continued to uphold and clarify the general principles regarding Article 3 and expulsion elucidated in *Soering* and *Chahal*.¹⁵⁹ In *Ahmed v. Austria*,¹⁶⁰ the plaintiff Ahmed had been granted refugee status in Austria as a member of a Somali dissident movement under Article 1 of the United Nations Convention Relating to the Status of Refugees.¹⁶¹ Later the authorities arrested Ahmed in Austria for an attempted violent robbery.¹⁶² Under the United Nations Convention, an individual forfeits his refugee status upon commission of a serious crime.¹⁶³ Thus, Ahmed faced revocation of his refugee status and deportation to Somalia. In a ruling similar to that in *Chahal*, the Court held that “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration” in Article 3 expulsion cases.¹⁶⁴ The Court concluded that because Ahmed would be at a real risk for mistreatment if returned to

158. *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, ¶ 107 (1996).

159. Earlier cases on Article 3 and expulsion precede the 1996 *Soering* case, although *Chahal* was the first major case in which the plaintiff won on grounds that an expulsion would lead to violations of Article 3. See *Vilvarajah v. United Kingdom*, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 14 Eur. Ct. H.R. 248, ¶ 108 (1991) (Tamils expelled from England not at personal risk for ill-treatment upon return to Sri Lanka); *Cruz Varas v. Sweden*, App. No. 15576/89, 14 Eur. Ct. H.R. 1, ¶ 82 (1991) (Chilean national expelled from Sweden not at real risk for ill-treatment upon return to Chile).

160. App. No. 25964/94, 24 Eur. Ct. H.R. 278 (1996).

161. See *id.* ¶ 11 (explaining how the Minister of Interior granted refugee status within meaning of Geneva Convention). See generally Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

162. See *Ahmed*, 24 Eur. Ct. H.R. ¶ 12 (1996). “[T]ogether with an accomplice, Mr. Ahmed had struck a passer-by in the face and attempted to steal his wallet.” *Id.*

163. See Convention Relating to the Status of Refugees, art. 33, ¶ 2, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Id.

164. *Ahmed v. Austria*, App. No. 25964/94, 24 Eur. Ct. H.R. ¶ 41 (1996).

Somalia, Austria would be in violation of Article 3 if it proceeded with the expulsion.¹⁶⁵

In *D. v. The United Kingdom*, the Court faced an Article 3 expulsion case with a significantly different factual context.¹⁶⁶ Authorities arrested D., a national of St. Kitts and Nevis, at London's Gatwick Airport while attempting to smuggle a large amount of cocaine.¹⁶⁷ When serving his prison sentence in the United Kingdom, it was discovered that D. was suffering from symptoms associated with the end stages of AIDS.¹⁶⁸ D. was to be returned back to St. Kitts and Nevis upon completion of his prison sentence, but petitioned the European Court to stay in England.¹⁶⁹ He argued that deportation to St. Kitts and Nevis would amount to a violation of the prohibition of inhuman treatment under Article 3 because his disease would progress without the sufficient treatment he could receive in England:

[H]is removal to St [sic] Kitts would condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution. . . . His already weakened immune system would not be able to resist the many opportunistic infections to which he would be exposed on account of his homelessness, lack of proper diet and the poor sanitation on the island.¹⁷⁰

The United Kingdom argued that, unlike the factual context in *Soering*, *Chahal*, or *Ahmed*, D. would not be at risk from receiving ill-treatment or persecution through the active efforts of government authorities or other entities, but would instead suffer from the terminal stages of a natural disease.¹⁷¹ Noting that removing D. to St. Kitts and Nevis would certainly "hasten his death" and "subject him to acute mental and physical suffering,"¹⁷² the Court sided with D. and found that in these excep-

165. See *id.* ¶ 47. "It follows that the applicant's deportation to Somalia would breach Article 3 of the Convention for as long as he faces a serious risk of being subjected there to torture or inhuman or degrading treatment." *Id.*

166. App. No. 30240/96, 24 Eur. Ct. H.R. 423 (1997).

167. See *id.* ¶ 7 (outlining facts surrounding D.'s arrest and imprisonment).

168. See *id.* ¶ 8 (noting D.'s diagnosis of AIDS after suffering symptoms of pneumocystis carini pneumonia).

169. *Id.* ¶¶ 10-11.

170. *Id.* ¶ 40.

171. See *D.* 24 Eur. Ct. H.R., ¶ 42. "His hardship and reduced life expectancy would stem from his terminal and incurable illness coupled with the deficiencies in the health and social-welfare system of a poor, developing country." *Id.*

172. *Id.* ¶ 52.

tional factual circumstances, a deportation by the United Kingdom would amount to a violation of Article 3.¹⁷³

The *Soering* and *Chahal* line of cases indicate that member-states to the Convention violate Article 3 by extraditing or expelling persons from their nations to non-member nations where they face a real risk of suffering from inhuman treatment. Given this precedent, it is difficult to imagine how European member-states to the Convention cannot be in violation of Article 3 by participating in a CIA program specifically designed to render persons to other nations for interrogation and torture. *Chahal* indicates that in such cases no consideration can be given to the person's activities or behavior, even in the context of national security and terrorism concerns.¹⁷⁴ Article 3's protections are absolute rights and cannot be diluted by other considerations.

III. CONCLUSION

Precedent from the European Court of Human Rights demonstrates that European nations which participated in the CIA rendition program are liable for violations of Article 3 of the Convention on Human Rights. This would include countries which allowed detention facilities to exist on European soil, as well as those which cooperated in the rendering of captives to destinations outside Europe to be mistreated or tortured. It is likely that in some cases the court systems of individual nations may address and resolve charges of extraordinary rendition as a domestic criminal legal procedure.¹⁷⁵ In other cases, European Court of Human Rights precedent may have more direct implications as a domestic matter. For example, the United Kingdom has adopted almost wholesale the European Convention on Human Rights as its national law,¹⁷⁶ and its courts have heard

173. See *id.* ¶ 53. "In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St [sic] Kitts would amount to inhuman treatment by the respondent State in violation of Article 3." *Id.*

174. *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. Ct. Rep. 413, ¶ 80 (1996).

175. See *Italy Considers CIA Kidnap Trial*, BBC, (Jan. 9, 2007), <http://news.bbc.co.uk/2/hi/europe/6243991.stm> (discussing Italian court hearings to indict CIA and Italian agents for kidnapping Egyptian cleric in Italy who was later tortured in Egypt).

176. Human Rights Act, 1998, c. 42 (U.K.).

and decided cases of foreign implication using European Court of Human Rights precedent.¹⁷⁷ Finally, the European Court itself would likely serve as the final arbiter of any case alleging rendition that survives domestic procedure.

177. *See R. v. Sec'y of State for Def.*, [2004] EWHC 2911 (QB) [81]-[89] (U.K.) (discussing case of Iraqi man tortured to death during British custody in Iraq).